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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 JAMES A. BIGELOW,

9 Plaintiff,

10 v.

11 NORTHWEST TRUSTEE SERVICES,
12 INC., et al.,

13 Defendants.

CASE NO. C14-5798 BHS

ORDER

14 This matter comes before the Court on Plaintiff/Counter Defendant James
15 Bigelow's ("Bigelow") motion to dismiss counterclaim (Dkt. 58); Defendants Renee
16 Parker and Wright, Finlay & Zak, LLP's ("Attorney Defendants") motion to strike
17 plaintiff's complaint for Anti-Slapp violations (Dkt. 60); Defendant Northwest Trustee
18 Services, Inc.'s ("Northwest") motion to dismiss for failure to state a claim (Dkt. 63);
19 Green Tree, MERS, Renee Parker, and Wright, Finlay & Zak, LLP's motion to dismiss
20 for failure to state a claim (Dkt. 65); Defendant Nationwide Title Clearing's
21 ("Nationwide") motion to dismiss for failure to state a claim (Dkt. 86); and Defendant
22

1 First American Title Insurance Company's ("First American") motion to dismiss (Dkt.
2 87). The Court has considered the pleadings filed in support of and in opposition to the
3 motions and rules as follows:

4 **I. PROCEDURAL HISTORY**

5 On October 7, 2014, Bigelow filed a complaint against Northwest, Green Tree,
6 and MERS asserting causes of action for (1) violation of the Fair Debt Collections
7 Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA"), (2) violation of the Washington
8 State Deed of Trust Act, RCW Chapter 61.24 ("DTA"), and (3) violation of the
9 Washington Consumer Protection Act, RCW Chapter 19.86 ("CPA"). Dkt. 1.

10 On November 13, 2014, Bigelow filed an amended complaint against the same
11 Defendants asserting the same causes of action. Dkt. 11.

12 On December 2, 2014, Green Tree and MERS filed a motion to dismiss. Dkt. 12.

13 On January 8, 2015, Green Tree filed a third party complaint against Bigelow,
14 Carolyn Bigelow, Wells Fargo Bank, N.A., and Oak Ridge Yelm Homeowners
15 Association. Dkt. 26.

16 On January 29, 2015, the Court granted Green Tree and MERS's motion to
17 dismiss, ordered Bigelow to join co-borrower Ms. Bigelow as an indispensable party, and
18 granted Bigelow leave to amend his complaint. Dkt. 35.

19 On February 23, 2015, Bigelow filed an amended complaint against Northwest,
20 Green Tree, and MERS and added Defendants Wright, Finlay & Zak, LLP, Ticor Title
21 Company, Nationwide, First American, and Renee Parker. Dkt. 44. Bigelow asserts
22

1 causes of action for violation of the FDCPA, DTA, CPA, slander of title, and intentional
2 infliction of emotional distress (“IIED”). Dkts. 44 & 44-1.

3 On March 11, 2015, Bigelow filed a motion to dismiss the counterclaim and third
4 party complaint. Dkt. 58. On March 20, 2015, Green Tree responded. Dkt. 64. Bigelow
5 did not reply.

6 On March 13, 2015, Attorney Defendants filed a motion to strike Bigelow’s
7 complaint for Anti-SLAPP violations. Dkt. 60. On April 6, 2015, Bigelow responded.
8 Dkt. 77. On April 8, 2015, Attorney Defendants filed a reply. Dkt. 79.

9 On March 17, 2015, Northwest filed a motion to dismiss for failure to state a
10 claim. Dkt. 63. On April 8, 2015, Bigelow responded. Dkt. 78. On April 9, 2015,
11 Northwest replied. Dkt. 80.

12 On March 20, 2015, Green Tree, MERS, and Attorney Defendants filed a motion
13 to dismiss for failure to state a claim.¹ Dkt. 65. On April 14, 2015, Bigelow responded.
14 Dkt. 84. On April 15, 2015, Green Tree, MERS, and Attorney Defendants replied. Dkt.
15 85.

16 On April 20, 2015, Nationwide filed a motion to dismiss for failure to state a
17 claim. Dkt. 86. On April 27, 2015, First American filed a motion to dismiss. Dkt. 87.
18 On May 20, 2015, Bigelow responded to both motions. Dkt. 90. On May 22, 2015, First
19 American replied. Dkt. 91.

21 ¹ The motion is 39 pages long, which is over one and a half times the allowable limit.
22 The Court will only consider the pages within the allowable range of any subsequent overlength
motion that is filed without permission.

II. FACTUAL BACKGROUND

On April 24, 2007, Bigelow and co-borrower Carolyn Bigelow (“Ms. Bigelow”) executed a Note in the amount of \$233,899.00 in favor of Pierce Commercial Bank. The Note was secured by a Deed of Trust encumbering property commonly known as 10018 Cascadian Avenue SE, Yelm, Washington 98597. The Deed of Trust was recorded with the Thurston County Auditor on April 27, 2007.

Defendants assert that the loan was transferred to Green Tree on April 19, 2012. The Corporate Assignment of Deed of Trust was recorded with the Thurston County Auditor on April 20, 2012. Defendants also assert that Green Tree is the holder of the Note and services the loan on behalf of the Federal National Mortgage Association.

Defendants assert that, beginning with the payment due on November 1, 2011, the borrowers defaulted under the terms of the Note and Deed of Trust by failing to perform monthly payment obligations. On May 10, 2012, Northwest sent a Notice of Default to the borrowers. After the borrowers failed to cure the default, Northwest sent a Notice of Trustee’s Sale. Bigelow filed this action shortly thereafter.

III. DISCUSSION

A. Motion to Dismiss

1. Standard

Motions to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is

1 construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir.
 2 1983). To survive a motion to dismiss, the complaint does not require detailed factual
 3 allegations but must provide the grounds for entitlement to relief and not merely a
 4 "formulaic recitation" of the elements of a cause of action. *Bell Atlantic Corp. v.*
 5 *Twombly*, 127 S. Ct. 1955, 1965 (2007). Plaintiffs must allege "enough facts to state a
 6 claim to relief that is plausible on its face." *Id.* at 1974.

7 Generally, the scope of review on a motion to dismiss is limited to the contents of
 8 the complaint. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). The Court,
 9 however, may consider documents that are not attached to the complaint "if the
 10 documents' authenticity . . . is not contested and the plaintiff's complaint necessarily
 11 relies on them." *Id.* (internal quotation marks omitted).

12 **2. Bigelow's Motion to Dismiss**

13 Bigelow moves to dismiss Green Tree's counterclaim for lack of jurisdiction. Dkt.
 14 58 at 2. Green Tree counters that the Court has supplemental jurisdiction under 28
 15 U.S.C. § 1367(a) and Green Tree was required to bring the claim as a compulsory
 16 counterclaim. Dkt. 64 at 2–4. The third party complaint, however, states that the
 17 "District Court has independent jurisdiction over this counterclaim on the basis of federal
 18 question pursuant to 12 U.S.C. § 1331" Dkt. 26 at 2. Because that statute does not
 19 exist, the Court will assume that Green Tree meant 28 U.S.C. § 1331, which confers
 20 federal question jurisdiction. *See* 28 U.S.C. § 1331. Under this statute, Green Tree must
 21 assert a cause of action "arising under the Constitution, laws, or treaties of the United
 22 States." *Id.* Green Tree has failed to do so because it only asserts a claim for judicial

1 foreclosure, which is not a federal question. Therefore, the Court grants Bigelow's
2 motion to dismiss the counterclaim against him.

3 **3. Anti-SLAPP Violations**

4 The Washington Anti-SLAPP law allows individuals to bring a "special motion to
5 strike any claim that is based on an action involving public participation and petition."
6 RCW 4.24.525(4)(a). A moving party who brings a special motion to strike has the
7 initial burden of showing by a preponderance of the evidence that the claim is based on
8 an action involving public participation and petition. RCW 4.24.525(4)(b). If the
9 moving party meets that burden, the responding party must establish by clear and
10 convincing evidence a probability of prevailing on the claim. RCW 4.24.525(4)(b).

11 In this case, Attorney Defendants have filed a special motion to strike Bigelow's
12 complaint for violating Washington's Anti-SLAPP laws. Dkt. 60. Attorney Defendants
13 argue that their actions representing their clients are protected activity under the statute.
14 Specifically, they argue that "pleadings, statements and writings 'in connection with'
15 civil litigation are covered by the Anti-SLAPP statute." Dkt. 60 at 7. Attorney
16 Defendants, however, fail to cite any Washington or California authority for this
17 proposition.² At most, Attorney Defendants have cited California cases in which the
18 courts granted motions based on activities such as filing claims in a public court.

19 *Navellier v. Sletten*, 29 Cal. 4th 82 (2002); *Feldman v. 1100 Park Lane Associates*, 160

21 ² Washington's Anti-SLAPP law is based on California's law, and Washington courts
22 "look to California cases for aid in interpreting the act." *Spratt v. Toft*, 180 Wn. App. 620, 631
(2014).

1 Cal. App. 4th 1467 (2008). The Court declines to extend this case law to the acts of
2 representing clients in public proceedings. Therefore, the Court denies Attorney
3 Defendants' motion.

4 **4. Nationwide and First American's Motions to Dismiss**

5 Nationwide and First American filed motions to dismiss Bigelow's complaint
6 because he fails to assert sufficient allegations against either of them to state a claim.
7 The Court agrees. Bigelow identifies Nationwide and First American in his claims for
8 violations of the CPA, slander of title, and infliction of emotional distress, but fails to
9 identify the specific actions these Defendants committed to violate these laws or inflict
10 any damage. Moreover, Bigelow's response is without merit and is summed up best by
11 First American:

12 Plaintiff filed a forty-one page document entitled "Memorandum of Law
13 Supporting an Opposition to a Motion to Dismiss," approximately forty
14 pages of which are copied directly from an irrelevant third-party
15 memorandum Plaintiff did not author. Nowhere in the document does
16 Plaintiff address First American's Motion to Dismiss or even mention First
17 American.

18 Dkt. 91 at 2. Therefore, the Court grants Nationwide's and First American's motion to
19 dismiss.

20 **5. Northwest's Motion**

21 Northwest moves to dismiss Bigelow's claims for violations of the FDCPA, DTA,
22 slander of title, quiet title, and IIED. Dkt. 63. Although Bigelow responded to
Northwest's motion, Northwest contends that Bigelow failed to respond to the portions of
the motion regarding the claims for FDCPA, slander of title, quiet title, and IIED. Dkt.

1 80. The Court agrees and considers such a failure as an admission that Northwest's
2 motion has merit. Local Rules, W.D. Wash. LCR 7(b)(2). Moreover, the Court agrees
3 with Northwest's positions on the merits of these claims. *See* Dkt. 63 at 5, 12–20.
4 Therefore, the Court grants Northwest's motion on Bigelow's FDCPA, slander of title,
5 and IIED claims.

6 With regard to the DTA claim, Bigelow seeks damages as well as a Court order
7 vacating the current foreclosure proceeding. Northwest argues that Bigelow is precluded
8 from seeking damages because there has not been a trustee's sale. Dkt. 80 (citing *Frias*
9 *v. Asset Foreclosure Services, Inc. et al.*, 181 Wn.2d 412 (2014)). The Court agrees and
10 grants Northwest's motion to dismiss Bigelow's DTA claim for damages.

11 As for the current foreclosure, Northwest argues that Bigelow's claims are
12 baseless. The Court agrees. Bigelow contends that Northwest "caused false and
13 misleading documents to be recorded . . . without authority" Dkt. 78 at 6. Bigelow
14 is essentially challenging Green Tree's appointment of Northwest as successor trustee
15 because it was fraudulent, in violation of numerous laws, and followed an invalid
16 assignment. Bigelow, however, lacks standing to challenge the assignment unless he can
17 show that he "has a genuine claim that [he is] at risk of paying the same debt twice if the
18 assignment stands." *Borowski v. BNC Mortgage, Inc.*, No. C12-5867 RJB, 2013 WL
19 4522253, at *5 (W.D. Wash. Aug. 27, 2013). Moreover, Bigelow's allegation that
20 Northwest breached its duty of good faith by failing to obtain proof that the beneficiary
21 was the actual owner of any promissory note does not state a claim because Northwest is
22 entitled to rely on the declaration from Green Tree. *Trujillo v. Nw. Tr. Servs., Inc.*, 181

Wn. App. 484, 502 (2014), *as modified* (Nov. 3, 2014), *review granted*, 182 Wn.2d 1020 (2015). Therefore, the Court grants Northwest’s motion on this claim as well.

6. Green Tree, MERS, and Attorney Defendants’ Motion to Dismiss

Green Tree, MERS, and Attorney Defendants (hereinafter “Defendants”) move to dismiss all of Bigelow’s claims because he fails to assert sufficient allegations against any of them to state a claim. The Court will address the merits of these arguments.

a. Failure to Join

In this case, Defendants argue that the Court should dismiss the case because Bigelow has failed to join an indispensable party, the joint borrower Ms. Bigelow. Dkt. 65 at 22. Dismissing a case for failure to join an indispensable party is a drastic remedy that may only be ordered after a court finds that a party is indispensable, the party may not be joined, and that “in equity and good conscience” the case may not proceed in the absence of the party. *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 779–80 (9th Cir. 2005). Even if Ms. Bigelow is an indispensable party and it would be inequitable to proceed in her absence, there has been no showing that she may not be joined. The only showing that has been made is Bigelow’s refusal to follow an explicit Court order, which carries its own remedies. Regardless, the Court denies Defendants’ motion on this issue.

b. FDCPA

In this case, Defendants argues that the Court should dismiss Bigelow’s FDCPA claim because they are not “debt collectors.” Dkt. 65 at 24–31. Although Defendants argue that Bigelow has an “allusion that MERS is a debt collector” (Dkt. 65 at 24 n.2),

1 Bigelow does not assert this claim against MERS. Dkt. 44-1, ¶¶ 179–198. Therefore, the
2 motion is without merit on this issue.

3 With regard to Green Tree, Defendants argue that Green Tree is not a debt
4 collector and, even if it is a debt collector, it did not violate the FDCPA. Dkt. 65 at 24–
5 29. Defendants argue that, in order to be a debt collector, the loan must be in default at
6 the time it was acquired. Dkt. 65 at 26. It is undisputed that Bigelow failed to make his
7 November 1, 2011 payment and that Green Tree acquired the loan on December 1, 2011.
8 Defendants contend that, pursuant to paragraph 6(C) of the Note, “the loan must be *more*
9 *than* 30 days past-due before it is declared to be in default.” Dkt. 65 at 27. Although that
10 paragraph covers when the Note Holder may send a Notice of Default, the preceding
11 paragraph clearly explains that, if the borrower does not “pay the full amount of each
12 monthly payment on the date it is due, [the borrower] will be in default.” Dkt. 16 at 7, ¶
13 6(B). Therefore, according to the Note, Bigelow was in default on November 2, 2011
14 and Defendants’ argument is without merit.

15 On the issue of whether Green Tree violated any provision of the FDCPA, Green
16 Tree argues that, as a matter of fact, it did not violate any relevant provision of the
17 statute. This is an improper argument to make on a motion to dismiss, which challenges
18 the pleadings. Therefore, the Court denies Defendants’ motion as to the merits of
19 Bigelow’s claim.

20 With regard to the Attorney Defendants, Bigelow’s claims are baseless. Although
21 the Attorney Defendants identify themselves in their communications as “debt
22 collectors,” such an identification does not establish that they are “debt collectors” under

1 the FDCPA. Moreover, Bigelow fails to establish as a matter of law that attorneys
2 representing creditors in litigation are subject to the FDCPA. Therefore, the Court grants
3 Defendants' motion as to the Attorney Defendants.

4 **c. CPA**

5 In this case, Defendants move to dismiss Bigelow's CPA claim because it is based
6 on "unfounded and unsupported allegations" Dkt. 65 at 32. Defendants, however,
7 fail to recognize that the Court may only evaluate whether sufficient allegations have
8 been made and should not evaluate the truthfulness of those allegations at this stage of
9 the proceeding. Moreover, Defendants' entire motion is based on what Bigelow has
10 failed to "establish" and is more properly a basis for a summary judgment motion instead
11 of a motion to dismiss. *Id.* at 32–51. Therefore, the Court denies Defendants' motion to
12 dismiss because Bigelow has asserted sufficient allegations to state a claim for relief.

13 **d. Slander of Title**

14 "Slander of title is defined as: (1) false words; (2) maliciously published; (3) with
15 reference to some pending sale or purchase of property; (4) which go to defeat plaintiff's
16 title; and (5) result in plaintiff's pecuniary loss." *Rorvig v. Douglas*, 123 Wn.2d 854,
17 859-60 (1994) (citing *Pay 'N Save Corp. v. Eads*, 53 Wn. App. 443, 448, 767 P.2d 592
18 (1989)).

19 In this case, Defendants argue that Bigelow has failed to establish every element
20 of his claim. Dkt. 65 at 51–52. Such arguments are also better suited for summary
21 judgment and not for attacking the pleadings. However, as Northwest argued, Bigelow
22 has failed to allege any pending sale, which is fatal to his claim. Dkt. 73 at 17.

1 Therefore, the Court grants Defendants' motion to dismiss Bigelow's slander of title
2 claim.

3 **7. Remedy**

4 "A pro se litigant must be given leave to amend his or her complaint unless it is
5 'absolutely clear that the deficiencies of the complaint could not be cured by
6 amendment.'" *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987). However, the
7 Court's "discretion to deny leave to amend is particularly broad where plaintiff has
8 previously amended the complaint." *City of Los Angeles v. San Pedro Boat Works*, 635
9 F.3d 440, 454 (9th Cir. 2011).

10 In this case, the Court denies Bigelow leave to amend and dismisses the majority
11 of his claims with prejudice. Bigelow has twice amended his complaint, once on his own
12 and once after the Court identified deficiencies in the operative complaint. Instead of
13 focusing on these deficiencies, Bigelow added additional parties without justification or
14 permission from the Court. Under these circumstances, the Court denies Bigelow leave
15 to amend his complaint.

16 **IV. ORDER**

17 Therefore, it is hereby **ORDERED** that

- 18 1) Bigelow's motion to dismiss counterclaim (Dkt. 58) is **GRANTED** and Green
19 Tree is **GRANTED** leave to amend the third party complaint;
20 2) Attorney Defendants' motion to strike plaintiff's complaint for Anti-Slapp
21 violations (Dkt. 60) is **DENIED**;
22

- 1 3) Northwest's motion to dismiss for failure to state a claim (Dkt. 63) is
2 **GRANTED** and Bigelow's claims against Northwest are **DISMISSED with**
3 **prejudice** because no amendment may cure the current claims;³
4 4) Green Tree, MERS, and Attorney Defendants' motion to dismiss for failure to
5 state a claim (Dkt. 65) is **GRANTED in part** and **DENIED in part**;
6 Bigelow's FDCPA claim against Attorney Defendants is **DISMISSED with**
7 **prejudice**; Bigelow's slander of title claim is **DISMISSED with prejudice**
8 because he was granted leave to amend and failed to properly amend the claim;
9 5) Nationwide's motion to dismiss for failure to state a claim (Dkt. 86) is
10 **GRANTED** and Bigelow's claims against Nationwide are **DISMISSED with**
11 **prejudice** because Bigelow failed to show that the claims may be cured by
12 amendment; and
13 6) First American's motion to dismiss (Dkt. 87) is **GRANTED** and Bigelow's
14 claims against First American are **DISMISSED with prejudice** because
15 Bigelow failed to show that the claims may be cured by amendment.

16 Dated this 1st day of June, 2015.

17 

18 BENJAMIN H. SETTLE
19 United States District Judge
20

21 _____
22 ³ This does not preclude claims based on actions taken in a subsequent foreclosure proceeding by this trustee.